FILE COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
APPELLANT,

vs.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

FILED FEBRUARY 11, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY, APPELLANT,

vs.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

INDEX.

	Original	Print
Record on appeal to the Court of Appeals	1	1
Statement under Rule 234	1	1
Notice of appeal from Unemployment Insurance Appeal Board to Appellate Division	2	2
Notice of decision of Unemploymen Insurance Appeal Board	3	2
Findings of fac', opinion and decision of Unemployment Insurance Appeal Board	5	3
Notice of appeal from Referee to Unemployment Insurance Appeal Board	13	9
Notice of decision of Referee	14	9
Findings of fact and decision of Referee	15	10
Request for hearing on initial determination	20	13
Notice of hearing	22	14
Minutes of hearing of June 12, 1940	23	15
Appearances	23	15
Testimony of Frank Van Emburg	24	15
Joseph Bergen	43	31
Frank Van Emburg (recalled)	52	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1943.

—5264

	Original	Print
Record on appeal to the Court of Appeals—Continued		
Minutes of hearing of June 12, 1940—Continued		
Colloquy between Referee and counsel	52	38
Testimony of Frank Van Emburg (recalled)	54	39
Colloquy between Referee and counsel	56	41
Employer's Exhibit 3 read into record—Letter dated April 1, 1936 from Division of Unemployment Insurance of New York Labor Department to International Elevating Co	58	42
Testimony of Joseph Bergen (recalled)	63	46
Affidavit of F. N. Van Emburg	68	49
Employer's Exhibit 1—Letter dated Jan. 14, 1937 from Treasury Department to International Elevating Company	70	50
Employer's Exhibit 2—Letter dated May 14, 1937 from Treasury Department to International Longshoremen's Association	71	51
Affidavit of no opinion	72	52
Stipulation waiving certification	73	52
Notice of appeal as of right to Court of Appeals	75	53
Order appealed from	77	54
Decision of Appellate Division	78	54
Opinion of Appellate Division for reversal, Schenck, J.	79	55
Affidavit of no further opinion	83	57
Stipulation waiving certification	83	58
Remittitur of Court of Appeals	85	58
Opinion of Court of Appeals, Finch, J.	87	60
Order and judgment on remittitur	94	69
Order allowing appeal	96	70
Petition for appeal	98	71
Assignment of errors	103	74
Cost bond (omitted in printing)	106	
Citation and service (omitted in printing)	107	
Praecipe for record	111	76
Clerk's certificate (omitted in printing)	112	
Statement of points to be relied upon and designation of parts of the record to be printed	114	76
Order noting probable jurisdiction	115	77

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

In the Matter of The Claim for Benefits under Article 18 of the Labor Law Made by JOSEPH BERGEN, Claimant; INTERNATIONAL ELEVATING COMPANY, Employer, Appellant; FRIEDA S. MILLER, Industrial Commissioner, Respondent

STATEMENT UNDER RULE 234

Proceeding for benefits under the unemployment insurance law on claim of Joseph Bergen, begun by Claimant's Request for Hearing dated May 2, 1940 and service on parties of Notice of Hearing dated May 27, 1940.

After hearing held June 12, 1940, Referee made decision dated July 9, 1940, from which employer appealed to Unemployment Insurance Appeal Board, by Notice of Appeal dated August 5, 1940.

Appeal by employer from decision of Unemployment Insurance Appeal Board dated December 16, 1940, affirming decision of the Referee and finding claimant to be eligible for benefits as determined by the Referee.

Notice of Appeal to this Court filed January 11, 1941.

Claimant appeared in person. The employer, International Elevating Co., appeared by Frank N. Van Emburg, its Assistant Treasurer and Cullen & Dykman, its attorneys. Respondent herein, the Industrial Commissioner, having been represented originally by Harry Rosen, Esq., Legal Bureau, Division of Placement and Unemployment Insurance, is now represented by the Attorney General, John J. Bennett, Jr., Esq. The names of the parties appear above.

There has been no change in the parties or their attorneys, except as herein indicated.

[fol. 2] STATE INDUSTRIAL COMMISSION, DEPARTMENT OF LABOR, DIVISION OF UNEMPLOYMENT INSURANCE

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION—January 11, 1941

SIRS:

Please Take Notice, that the above-named employer, International Elevating Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, from the decision of the Unemployment Insurance Appeal Board, made on December 6, 1940, and dated December 16, 1940, holding that the above claimant worked in employment subject to the Unemployment Insurance Law of the State of New York, and from each and every part of said decision and from the whole thereof, on the ground that the same is contrary to law.

Dated: Brooklyn, New York, January 11, 1941.

Yours, &c., Cullen & Dykman, Attorneys for Employer, International Elevating Company, Office & P. O. Address, 177 Montague Street, Borough of Brooklyn, City of New York.

[fol. 3] To: State Industrial Commissioner, 80 Centre Street, New York, N. Y.; Honorable John J. Bennett, Jr., Attorney General of the State of New York, Albany, N. Y.; Unemployment Insurance Appeal Board (2 copies), 342 Madison Avenue, New York, N. Y.; Joseph Bergen, 7314 Fifth Avenue, Brooklyn, N. Y.; Clerk of the Appellate Division, Third Department, Albany, N. Y.

[fol. 4] BEFORE UNEMPLOYMENT INSURANCE APPEAL BOARD

State of New York

Department of Labor

342 Madison Avenue

New York City

NOTICE OF DECISION—December 16, 1940

S S Number 052 03 7216. Appeal Number ——.

Claimant: Joseph Bergen, 7314-5th Avenue, Brooklyn, New York.

Other Parties: International Elevating Company, 2 Broadway, New York, New York (e); Cullen & Dykman, Esqs., 177 Montague Street, Brooklyn, New York; New York State Employment Service, 512-86th Street, Brooklyn, New York; Mr. Harry Rosen, Legal Bureau, New York City.

Please Take Notice that in connection with the above appeal, a decision was made on December 6, 1940 as per copy of decision annexed.

Dated, December 16, 1940.

Unemployment Insurance Appeal Board, by Louis Perlstein, Executive Secretary.

[fol. 5] BEFORE UNEMPLOYMENT INSURANCE APPEAL BOARD

FINDINGS OF FACT, OPINION AND DECISION—December 6, 1940

Case #3538-40. 533-96-4OR.

State of New York, Department of Labor, Unemployment Insurance Appeal Board.

Re: Name
S. S. No. — Employer No. —.

The employer appeals from the decision of the referee dated July 9, 1940, holding that claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings therein.

Hearings were held before the referee at which the claimant, the employer corporation, by its assistant treasurer, its attorney and a representative of the Industrial Commissioner were present and were accorded full opportunity to be heard. Briefs have been submitted on behalf of the employer and the Industrial Commissioner for the consideration of the Board.

Based on the record and the testimony in this case, the Board makes the following

Findings of Fact:

Claimant was employed by appellant during 1938 and 1939. There is no dispute as to the length of claimant's employment or as to the amount of his earnings. The ques-

tion in dispute is whether or not claimant worked in employment subject to the law.

Claimant was a ship-trimmer in connection with the handling of grain. His services were performed on floating grain elevators, which are documented under the laws of the United States. These elevators are self-propelled and generate their own power. The function of the elevators is [fol. 6] to transfer grain in bulk between ocean going vessels and canal boats or other boats. The work of the claimant during 1938 and 1939 was the storing and trimming of grain in the holds of the ships.

Claimant was a member of a local union of the International Longshoremen's Association. The employer had a closed shop agreement with said union and only members of the union worked on the grain elevators. Compensation for the services of the union members was measured by a predetermined fixed scale of $5.00 for each thousand bushels handled. The trimmers usually met in a union meeting room on South Street in the City of New York, and if a job was available, all would proceed from the meeting room to the job.

Claimant did not perform any work on the grain elevator until it had been tied up alongside the steamer and the harbor vessel between which the transfer of grain was to be effectuated. Occasionally, after one job was done there was another job to be done on a vessel tied up at a different pier. In that event, claimant had his choice of proceeding by land to the other job or remaining on the grain elevator and being transported thereon, in which event he did not participate in the navigation of the vessel.

Claimant's work was all performed under the supervision of a superintendent in appellant's employ and not under the supervision of the captain of the grain elevator.

While the boat was under way from one pier to another, it was then under the supervision of the captain of the vessel who was a licensed individual.

Claimant did not sign any ship's articles. He was not fed on the ship and when he went to lunch he had to go to a [fol. 7] restaurant situated on the shore. Claimant lived in the Borough of Brooklyn and went home to his residence every night. He worked eight hours a day and any work done thereafter was considered overtime. On a few rare occasions when the claimant was too tired to go home, he

slept on the floor of the boat, as there were no sleeping accommodations on the boat.

It has been conceded by the employer that the greater part of the work performed by the claimant in 1938 and 1939, prior to June 3, 1939, was in the State of New York and that the base of operations after June 3, 1939, was in the State of New York.

Opinion

The issue to be determined herein is whether or not the claimant worked in employment subject to the Unemployment Insurance Law.

It is the contention of the appellant that the claimant was an officer or member of a crew, and therefore comes within the exemption as outlined under the Social Security Act and the Internal Revenue Code, and that under said circumstances the State of New York has no jurisdiction in this case.

Title 9 of the Social Security Act as amended is not contained in the Internal Revenue Code, except Section 904. The Code provides:

"The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the [fol. 8] United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

• • • • • • •

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; • • •" (Section 1607-(c) (4)).

There is no provision in the New York State Unemployment Insurance Law specifically exempting from its provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution

which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from the provisions of the Unemployment Insurance Law (Appeal Board 1180-39).

There is no question that the grain elevator on which the claimant performed his services was a vessel within the meaning of that term and there is also no question that the waters on which said services were performed were navigable waters of the United States.

Therefore, the question to be decided by us is whether or not the claimant's services were performed as an officer or member of a crew. If we find that such services were per- [fol. 9] formed as an officer or member of a crew, then the appellant must prevail and New York State would have no jurisdiction over the claimant and the employer herein. If, however, we find that the claimant's services were not performed as an officer or member of a crew, then the claimant is an employee, working in employment subject to the Unemployment Insurance Law.

Regulation 90 relates to the excise tax on employers under Title 9 of the Social Security Act, which refers to unemployment insurance tax on employers of eight or more. Article 206(3) of Regulation 90 gives the following definition of "officers and members of the crew":

"The expression 'officers and members of the crew' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The exception extends, for example, to services rendered by the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, deck hands, porters, and chamber-maids and by seal hunters and fishermen on sealing and fishing vessels."

Since the phrase "officers and members of the crew" is a phrase of exclusion, it must therefore be given a narrow construction. The appellant relies on the case of *The Buena Ventura*, 243 Fed. 797, to the effect that a wireless operator hired and paid by an independent contractor was considered a member of a crew. In that case, the justice presiding

[fol. 10] stated that it was his opinion that a wireless operator was a far more important person in the safe operation of a voyaging vessel than a fireman, cook, or the like, but said:

"It is preferred to put the decision on this broad ground: i. e.; that a man who serves the ship as a result of a contractual relation of any kind, and serves her *in her navigation*, is a member of the crew and entitled to the privileges of a seaman." (*The Buena Ventura*, 243 Fed. 797.) (Italics ours.)

The Justice further went on to give a definition of the word "crew" as follows:

"The word 'crew' is explicitly considered in *United States v. Winn*, 3 Sum. 209 Fed. Cas. No. 16,740. What Justice Story there said has not been improved upon, though the language of Dodge, J. in *The Bound Brook* (D. C.), 146 Fed. at 164 may be quoted as a fair summary:

'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her *aiding in her navigation*, without reference to the nature of the arrangement under which they are on board * * *.'" (Italics ours.)

Judge Deadly aptly stated the definition as follows:

"The words 'crews of the vessels' as here used, include all of the ship's company—all the seamen and officers except [fol. 11] the captain (Rap. and Law Dict. Verb. 'crew'—*U. S. v. Winn*, 3 Sum. 209).

"The crew of a vessel—the ship's company—in a general sense, comprises all persons, who, in pursuance of some contract or arrangement with the owner or master are on board the same *aiding in the navigation thereof.*" (*The Marie* (*Dominick Dupee, Libellant*), 49 Fed. 287). (Italics ours.)

It is to be expressly noted, therefore, that in order for the work performed by the claimant in the instant case to come within the phrase "officers and members of the crew" he must contribute to the operation and welfare of the vessel and aid in the navigation thereof.

In the instant case, the claimant did not start to work until the grain elevator was tied alongside the boat either

from which or to which the grain was to be transferred. At that moment the captain relinquished control and the superintendent in charge took over the operation of the transfer of the grain. The work performed by the claimant was merely transferring the grain between two boats. The work performed by the claimant was not essential and did not contribute to the operation and welfare of the vessel as a means of navigation, nor did his work aid in the navigation of the boat.

The claimant never performed any work while the elevator was being transported from one pier to another, but started his work after the elevator had been tied alongside the boat to which the grain was to be transferred.

The claimant belonged to a union of trimmers. They met in a union meeting room in South Street, New York. [fol. 12] They proceeded from said union meeting room to the job, wherever said job was located. They worked eight hours a day and any time spent working thereafter was considered overtime. They were not fed on board ship. It was unnecessary for the claimant or any member of the union to sign ship's articles. Claimant was under the supervision of a superintendent who was a different person than the master of the boat. The master of the boat, the captain, was necessarily a licensed individual and the crew consisted of engineers, firemen and deckmen.

Since we have come to the conclusion that the work performed by the claimant was not in furtherance of the operation and welfare of the vessel as an instrument of navigation, it necessarily follows that the claimant worked in employment subject to the Unemployment Insurance Law.

Decision

Claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings as fixed by the referee.

The decision of the referee is affirmed.

Dated December 6, 1940.

(S.) I. D. Neustein, Member.

[fol. 13] BEFORE UNEMPLOYMENT INSURANCE APPEAL BOARD

[Title omitted]

NOTICE OF APPEAL TO APPEAL BOARD—August 5, 1940

SIRS:

Please Take Notice that International Elevating Company, Employer herein, hereby appeals to the Unemployment Insurance Appeal Board from the decision of the Referee of the Industrial Commissioner herein, dated July 9, 1940, and from each and every part of said decision.

Dated: Brooklyn, N. Y., August 5, 1940.

Yours, etc., Cullen & Dykman, Attorneys for Employer-Appellant, Office and P. O. Address, 177 Montague Street, Borough of Brooklyn, City of New York.

[fol. 14] To: New York State Division of Unemployment Insurance Local Employment Office, 512 86th Street, Brooklyn, New York; Joseph Bergen, 7314 Fifth Avenue, Brooklyn, New York.

BEFORE UNEMPLOYMENT INSURANCE REFEREES' UNIT

NOTICE OF DECISION, JULY 17, 1940

Please take notice that as a result of a hearing held before an Unemployment Insurance Referee a decision was made, a copy of which is hereto annexed.

Dated July 17, 1940.

Unemployment Insurance Appeal Board, by Samuel I. Kastle, Administrative Referee.

Take further notice that if you are not satisfied with the decision you may appeal to the Unemployment Insurance Appeal Board by calling in person at the local employment office and filing a Notice of Appeal or by writing a letter to the local employment office at 512 86th Street, Brooklyn, N. Y., stating your wish to appeal from this decision.

Such appeal must be taken within twenty days (20) after the mailing or personal delivery of this decision.

[fol. 15] BEFORE UNEMPLOYMENT INSURANCE REFEREES' UNIT

S. S. No. 052-03-7216

Index No. 533-96-40R

Date: July 9, 1940.

Claimant: Joseph Bergen.

Referee: Henry Eisen, at 342 Madison Avenue, N. Y. C., on June 12, 1940.

FINDINGS OF FACT AND DECISION OF REFEREE, JULY 9, 1940

Appearances:

Joseph Bergen, Claimant.

International Elevating Co., Employer, by Frank N. Van Emberg, Assistant Treasurer.

Cullen & Dykman, Esqs., Counsel for Employer, by Robert Lisle, Esq., of Counsel.

Harry Rosen, Esq., representing the Legal Bureau, Division of Placement and Unemployment Insurance.

Issue:

Whether or not claimant's employment is maritime in nature and as such exempted under the provisions of the Unemployment Insurance Law.

From the testimony adduced, the following are the

FINDINGS OF FACT:

The claimant was employed by the corporation hereinafter designated in 1938 and 1939. His duties were those of a "header" or "trimmer" in connection with handling of grain. These services were performed on vessels plying in navigable waters in and about the New York harbor and tributary streams.

[fol. 16] The vessels are known as grain elevators, documented under the laws of the United States. Since the home port is New York City, the elevators are duly registered at the New York Custom House. The hailing port is Jersey City, New Jersey. The floating elevators are self-propelled and generate their own power. Their function is to transfer grain in bulk to ocean-going vessels. This grain is brought to the New York harbor in vessels from other ports. The ultimate destination of the grain is the foreign countries.

The principal handling method involves the use of an elevator leg for direct vertical lifts. An endless chain of buckets scoop up the grain and carry it overhead where it is turned out by inversion of the buckets and dropped into the receiving steamer through a pipe. The work entailed is exclusively related to the handling, transferring and delivering grain in bulk, requiring its weighing, cleaning and storing. Obviously these operations, in the main, represent a commercial occupation rather than a maritime pursuit. In no sense is such a vocation allied with navigation or the welfare of a vessel.

The claimant and co-workers are members of a union. This organization, because of a "closed shop" agreement with the employer is the exclusive source of supply of the grain handlers. Compensation for the services of these workers is measured solely by a predetermined fixed union scale of five dollars per thousand bushels handled.

The elevators have full complements of crews, such as captain, engineers, deckhands, etc. This personnel is distinct from the grain workers. It is significant that when the elevator is navigated, the captain is in full command of the [fol. 17] elevator. When, however, the elevator is engaged in the process of transferring, trimming, weighing and shoveling the grain, the responsibility for supervision is shifted to a superintendent.

The company herein has not filed reports with or paid contributions to the New York State Unemployment Insurance fund, taking the ground that all grain workers are in maritime employment. A ruling made by the Federal Treasury Department takes the position that such employees are members of crews and are excepted from tax liability under Section 811 (b) (5) of the Social Security Act. A similar ruling was made tentatively by a former acting executive director of the Division of Unemployment Insurance, which however was conditioned upon further information requested from the company, but not subsequently supplied.

These ex-parte determinations are not binding upon the claimant. It becomes necessary, therefore, to examine the facts and circumstances to ascertain whether in the instant case, the maritime law has such exclusive jurisdiction as to exempt grain trimmers from the benefits provided in the Unemployment Insurance Law.

The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be in conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matters.

An intrastate tax designed to add a formalized right to wage earners of the instant type who become unemployed through no fault of their own is not in contravention of the substance of admiralty laws. The Unemployment Insur- [fol. 18] ance Act is part of social reforms approved and encouraged by the United States Government. To exclude from coverage a large class of workers who take no part in the navigation of vessels would seem inconsistent with and indeed a negation of the intent to bring all industrial workers within the protection of the Unemployment Insurance Law against the hazards of unemployment, except those specifically exempted by the Act. It is the function of the State to designate the choice of beneficiaries. In the selective process, it is the status and nature of the work which must be given due emphasis, rather than some obscure construction of the maritime law. Thus the opinion is held that no valid reason exists for placing the workers herein considered in the same category as officers and members of crews of vessels. A similar conclusion was reached by the Appeal Board with respect to dredge workers (Case 1180-39).

The earnings are not in dispute. The employer who is subject to the Unemployment Insurance Law, submitted wage credits corresponding to the sums tabulated herein. It is conceded also that the greater portion of the work performed was in the waters adjacent to the State of New York. This data is detailed in an affidavit filed in the claims folder and made part of the record, and supplements the evidence adduced.

Based upon the record and testimony, the amounts as set forth herewith are allowed:

	1938			
	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
International Elevating Co., 2 Broadway, N.Y.C.	305.18	110.82	279.21	195.23
	1939			
	143.80	8.53	185.71	416.03

[fol. 19] DECISION:

Upon all the evidence, I find that the claimant is not an officer or a member of a crew of a vessel. His employment is not exempted under the provisions of the Unemployment Insurance Law. The employer herein is liable for tax contributions on his wages and the wages of all others similarly situated. I also find that the claimant had earnings in covered employment in the sums as herein tabulated and is entitled to benefit rights based upon these figures, subject to local office records as to weeks of total unemployment.

Copy of this decision is being forwarded to the Bureau of Tax and Wage Records for the collection of contributions due.

Henry Eisen, Referee.

Joseph Bergen, 7314 Fifth Ave., Brooklyn, N. Y.
International Elevating Co., 2 Broadway, N. Y. C.
Harry I. Rosen, Esq., 342 Madison Ave., N. Y. C.
Cullen & Dykman, 177 Montague Street, Brooklyn, N. Y.
533-96-40R (1)
L. Goldberg, Bk. 347/6/12/40.
E. Taylor, Bk 197, 7/8/40.

[fol. 20] State of New York

Department of Labor

Division of Placement and Unemployment Insurance

REQUEST FOR HEARING ON INITIAL DETERMINATION—May 2, 1940

Local Office No. 533.

Claimant Joseph Bergen, Address 7314-5 Ave., B'klyn.
S. S. Acct. No. 052-03-7216

I request a hearing on the issue of: Earnings, X 1938. Coverage, X 1939.

Reason for Contest: I claim the following earnings in employment subject to the New York State Unemployment Insurance Law in addition to the earnings on which my Initial Determination dated —— was based.

Employer, International Elevating Co. Address Produce Exchange Bldg. N. Y. C. Add'l. Money Wages in

Each Quarter, $890.44-1938; $754.10-1939. Other Remuneration in Each Quarter ——.

Initial Determination was based on following earnings:

Employer	Total Wages and Other Remuneration in Each Quarter
.....	.....
.....	.....

Signed Joseph W. Bergen, Sr., Claimant.

[fol. 21] Additional Information: (Names and addresses of other persons, witnesses, co-workers, union, etc., to be notified of hearing.)

See Employer's answer to E. S. 11 Re: Coverage.

Claimant states that he worked on ships tied up at dock, loading & unloading grain.

L. W. Jeffries (Insurance Manager or Deputy), 512-86 St., B'klyn (Address).

[ ] Contest on Original Claim.

Check box if contest has arisen subsequent to filing of Original Claim, ES-333, but prior to filing of Additional Claim, ES-333.5.

[fol. 22] Before Unemployment Insurance Referees' Unit

S. S. No. 052-03-7216

Notice of Hearing—May 27, 1940

Claimant: Joseph Bergen, 7314 5th Ave., Bklyn, N. Y.

Other Parties: International Elevating Co., 2 Broadway, N. Y. C.

Harry I. Rosen, Esq., Legal Bureau Building.

You are hereby notified to appear on June 12, 1940 10:00 at 342 Madison Avenue, Room 1008, New York City, before Referee Henry Eisen.

Purpose of Hearing: To determine whether claimant worked in employment subject to the law and claimant's correct 1938 & 1939 earnings.

Important! To all Parties:

You must bring to this hearing your witnesses, if any, and all evidence that has a bearing on this case, including all pay records, books, statements of earnings, et cetera.

Unemployment Insurance Appeal Board, By Samuel I. Kastle, Administrative Referee

rs-1

[fol. 23] BEFORE UNEMPLOYMENT INSURANCE REFEREES' UNIT

[Title omitted]

MINUTES OF HEARING—June 12, 1940

Social Security Number: 052-03-7216
Index Number: 533-96-40R

Date of hearing: June 12, 1940.
Place of hearing: 342 Madison Avenue, New York City.
Before—Henry Eisen, Referee.
Libby Goldberg, Hearing Stenographer.

APPEARANCES:

Joseph Bergen, Claimant.
International Elevating Co., Employer, by Frank Van Emburg.
Cullen & Dykman, Esqs., Attorneys for Employer, by Robert Lisle, of Counsel.
D. P. U. I., by Harry Rosen, Esq.

Case duly called.

[fol. 24] FRANK VAN EMBURG, having first been sworn, testified as follows:

By the Referee:

Q. What company do you represent?
A. International Elevating Company, 2 Broadway, New York City.
Q. In what capacity?
A. Assistant treasurer.
Q. And you are familiar with the employment record of the claimant, Joseph Bergen?
A. Yes.

Q. While with your company?

A. Yes.

Q. What type of work did he do?

A. He was called a trimmer. That means that he handled the grain in either canal boats or harbor boats or the ocean going vessels. We transfer grain from a harbor vessel to an ocean going vessel and vice versa. That is our business, just transferring the grain.

Q. When did the claimant commence working for you?

A. I can't say as to that but you asked for '38 and '39 earnings which I brought. I didn't go back further.

Q. During what period in 1938 did he work for your company?

A. 1938 he worked in January. He worked every month in 1938.

Q. What were his earnings for January, February and March?

A. January, $91.82, February, $141.57, March, $71.79.

Q. Let me have the earnings for April, May and June.

A. April, $61.29, May, $31.84, June, $17.69.

Q. July, August and September.

A. July $62.53, August, $90.49, September, $126.19.

Q. No, October, November and December.

A. October, $99.69, November, $31.42, December, $64.02. Do you wish the total?

Q. Yes.

A. $890.44.

Q. Did he work in 1939?

A. Yes, he did. He worked in January, February and [fol. 25] March, 1939 and we have one payroll in April. He didn't work again until September, October, November and December.

Q. Give me the figures for January, February and March, please.

A. January, $42.12, February, $61.19, March, $30.52, April, $8.53. September was the next month in which he earned anything, $185.17, October, $124.93, November, $103.90, December, $187.20; total for the year was $754.10.

Q. Can you describe in detail the particular work that the claimant did?

A. Well, maybe I better say what our elevator is in the first place to give you a better idea. The elevator consists of a vessel, one hundred feet long, with a tower in the center. On one side is what we call a leg suspended from a yoke

and this leg dropped in the grain vessel or harbor vessel and consists of an endless chain of buckets and these buckets pick up the grain from grain boats and take it up in the elevator. The trimmers handle steam shovels in the hold of the harbor vessel. The steam shovel is controlled by power in the elevator. They place this shovel in position and the power pulls it up takes the grain up to the leg. Now, you have the grain going, if the elevator is weighed, and dropped into the steamer through a pipe and in the vessel, in the steamer, these men also handle this grain with shovel or scoop. The grain falls into the shovel or scoop and they can throw it maybe fifty, seventy-five feet to whatever part of the hold has to be stowed. That's what the work consists of.

Q. Who owns the vessel?

A. International Elevating Company.

Mr. Lisle: May I interrupt? Did you mean the elevator or the grain vessel?

[fol. 26] Q. Well, the elevator and the grain vessel.

A. You mean the harbor vessel?

A. Yes.

Q. Yes.

A. That belongs to anyone.

Q. The elevator is owned by your company?

A. The elevator belongs to our company. The grain boats, the harbor boats can come from the canal, railroad, any place. They are brought up along side of our elevator that lies along side of the steamer with the elevator between it, pick the grain up from the boat and drops it into the steamer.

Q. The elevator is stationed there?

A. It's a floating elevator.

Q. Is the elevator self-propelled?

A. Some are and some are not. We move the elevators around to alongside the steamers where they want to load grain.

Q. Is it movable from the shore by any means?

A. From the shore? I don't quite get what you mean.

Q. The elevator, can it be moved from the shore by means of rope or things?

A. Tugboat on a scow.

Q. Not by means of any wires or ropes?

A. Oh, no. That's not our method.

Q. Now, what was the claimant always stationed on the elevator in the hold as you say?

A. He is not stationed on the hold. He sometimes works on the elevator. You're Joseph Bergen? I'd know you. You are the son. They sometimes work on the elevator or work in the hold of the grain boat or in the hold of the steamer.

Q. How does the claimant reach the elevator?

A. Reach it?

Q. Yes.

A. I don't know how he reaches it—the same as anybody else when they go to their work. Is that what you mean?

[fol. 27] Q. Does he reach it by means of a boat?

A. Oh, no. He goes down the pier.

Q. You say the elevator is stationed in the water, is that right?

A. Stationed where?

Q. You stated that the elevator is stationed in the waters?

A. We place the elevator wherever it is ordered to go to unload grain.

Mr. Rosen: May I ask a question, Mr. Eisen?

Q. When the grain is being loaded is the elevator tied to the dock or out in the harbor or where?

A. It is tied to the dock. The elevator is attached to the steamer and the grain boat is outside the elevator. The three lay right in line against the pier.

Q. Has the claimant any quarters in the elevator?

A. Nobody sleeps in the elevator but we have quarters in the elevator for the trimmers. Right? We have quarters there which they occupy. Nobody sleeps on the elevator. It is a day job. All the employees live nearby and we don't go out the harbor.

Q. And they return to their home at the end of the day's work?

A. Yes and come back in the morning.

The Referee: Did you want to question, Mr. Rosen?

Mr. Rosen: Yes, please.

By Mr. Rosen:

Q. When a vessel is being loaded by grain, will you explain to us this. Is the vessel, the big vessel, moored to the docks?

A. Yes.

Q. Is the elevator moored to the docks?

[fol. 28] A. The ocean going vessel is moored in the dock. The elevator is attached to the steamer by line.

Q. Is it also attached to the dock by line?

A. No. The grain boat is attached to the elevator by lines. They are held in position there together.

Q. So, first you have the big vessel, then you have the elevator and then the grain boat. Is that correct?

A. Yes.

Q. When the trimmer wants to get on the elevator from the pier does he have to take a small boat to get there?

Mr. Lisle: He is already on the elevator.

Q. He is on the elevator before it starts the operation?

A. He is very often. If he isn't he goes over the steamer.

Q. Before the operation starts where is the elevator? Is that also moored to some dock?

A. We have a pier in Jersey City, foot of Morris Street, where we keep our boats when they are not working. We receive an order, then we order the elevator out to the pier in which it is going to work.

Q. Assuming the vessel to be loaded is at one of the piers on the New York State side of the river or the bay, where is your elevator? Do you tow it from New Jersey over here?

A. Oh, yes.

Q. You never dock the elevators in New York?

A. No.

Q. How many elevators do you have?

A. Eight.

Q. Are they documented vessels?

A. Documented vessels under the laws of the United States in the Customs Office.

Q. Where is the home port of these vessels, if that's necessary?

A. The home port, I suppose, is New Jersey. Isn't it?

Q. I don't know. Do you happen to have it?

[fol. 29] A. They are documented, they are registered in the Customs Office. Where would the home port be?

Q. I don't know. Have you licenses with you?

A. No, I haven't.

Mr. Lisle: I should think it would be Jersey City.

Mr. Bergen: That's the home port. That's where the boat comes from.

Q. During the two years involved in this proceeding, was Mr. Bergen working on the same elevator?

A. The same elevator? I think so. You might ask Mr. Bergen?

Q. I will ask him that after.

A. I am not sure of that.

Mr. Lisle: Mr. Van Emburg's is second hand information. He had to ask the superintendent, I think.

A. The trimmers each have their own elevator. When the elevator goes out the same trimmers go aboard. They are just the same part of a crew as the fireman.

Q. Mr. Van Emburg, will you tell us something about the hiring of the trimmers? How did you hire the trimmers?

A. They belong to a union, local union of the I. L. A. and we don't hire them individually. The union supplies the number of men agreed upon for each elevator. There is a boss trimmer and we can't pick our men. We take the gang as they give it and they are always the same. If we are busy there might be some changes but the same men stick to the same elevator.

Q. If the elevator isn't busy did you still pay the trimmers?

A. Oh, no.

[fol. 30] Q. They are paid how?

A. By piece work.

Q. What do you mean by piece work?

A. So much per thousand bushels.

Q. How did you pay them?

A. Five dollars per thousand bushels. We pay them once a week.

Q. And has Mr. Bergen's work with the company been rather steady? I presume so from this record.

A. It's steady—when we had work to do. The last four, five years our business has been very bad, losing money all the time and we didn't have work, they didn't work.

Q. Now, tell us, Mr. Van Emburg, where does that work take place? Where are those boats located, where does the loading take place?

A. On the river, might be around Brooklyn. It's always on navigable waters of the United States.

Q. It is the contention of the Industrial Commissioner that navigable waters of the United States within the territorial limit of the State of New York, that with regard to such employment the New York State Unemployment Insurance Law has jurisdiction. In other words, that we can tax employment on the navigable waters of the United States provided it is within the territorial limits of the State of New York. That is why I am asking you the employment of Mr. Bergen. Can you tell just where that took place, was it on the Hudson River, on the New York side?

A. The record I have here—I can't tell—that would be considerable investigation to determine just where he did work every day to find out which earnings were which.

Q. You make up payrolls, do you not? I don't mean you, I mean your organization.

A. Yes.

Q. And that payroll presumably has all the data necessary for your accounting purposes?

A. The payroll has on it only the number of bushels done during the week.

[fol. 31] Q. Doesn't it have the elevator on it?

A. The elevator—no.

Q. And the vessel loaded?

A. No, just the boats from which the grain was received.

Q. I am sure, Mr. Van Emburg, that your accounting department or payroll department could do the same for us here as other steamship companies have—give us definite information as to where the particular boat is located.

A. Of course, we have that information.

Q. I know you have because all the companies do.

A. I know but it is not consolidated in one place that we could say that was earned in New York and that in New Jersey. That one item $59.81, part of it might have been earned in New York and part in New Jersey. It's all spread out. The elevator might move from one place to another on different jobs.

Q. Let me ask you this. Is your company a covered employer within the meaning of our law. Have you a registration number from our Albany office?

A. We have a registration number for our office employees. These men we considered part of the crew. Each one

is necessary to the operation of our elevator; we couldn't transfer the grain without everybody on board; we would be out of business.

Q. Who is in charge of an elevator?

A. We have different superintendents.

Q. I know.

A. R. M. Pollack, general of the seniors.

Q. I don't mean the name, I mean his record.

A. A superintendent—he could be called master.

Q. Does he have need of a master's ticket, in other words, to operate one of those?

A. Oh, no. He doesn't need a master's ticket.

Q. Do you have regular crews signed on for these elevators, crews similar to crews on an ocean going vessel?

[fol. 32] A. We have captains, engineers, firemen, deckmen.

Q. When these trimmers are hired and assigned to an elevator do they have to sign the articles just the same as deckmen or engineer?

A. The deckhand and engineer don't have to sign any articles as far as I know.

Q. Does the trimmer require any license or certificate to do his work?

A. No. The engineer of the propeller, captain——

Q. I am talking about the trimmers. Do they require a license of any kind?

A. No. They are not certificated.

Q. They are all union men, I presume?

A. All union men.

Q. All you need to complete your complement of trimmers is to call the union and have them send competent trimmers. They require no license or certificate or statement of any kind certifying to their ability to do that work?

A. No.

Mr. Rosen: Mr. Eisen, I will have to ask for an adjournment of this case and ask Mr. Van Emburg to produce the boat licenses, whatever it is called.

Mr. Lisle: Find out the home port.

Mr. Rosen: I'd like to see the licenses itself.

Mr. Lisle: Wouldn't it be sufficient if Mr. Van Emburg would send you a letter with that information?

Mr. Rosen: I want information on what boats Mr. Bergen worked on this position, where they were located and the

times he worked with relation to the geographical outline of the harbor and river.

Mr. Lisle: Might it be more convenient for you to have a [fol. 33] statement prepared and sent to you or would you want an opportunity to examine?

The Referee: I believe we should continue with the hearing and get the testimony of the claimant on that very point and see what information he can give us.

Mr. Rosen: All right, Mr. Eisen.

The Referee: Then if an adjournment is needed you can request it later.

Mr. Rosen: The request of an adjournment will be needed by us in this matter.

By the Referee:

Q. Did the claimant in any way contribute to the welfare of the vessel?

A. Yes.

Q. In what way?

A. They handle lines and tie up the vessels at times, not always.

Q. You wouldn't consider him a member of the crew of the vessel?

A. Positively.

Q. Now, can you tell me whether or not the work performed by the claimant was adjacent to the New York harbor or any other place?

A. What's that?

Q. Adjacent to New York harbor?

Mr. Lisle: I am sorry. I have to object to that question. I don't know what it means.

A. I don't know either.

Q. Well, whether the work performed was on an elevator that was adjacent to New York harbor or any other place. Does that clear up the question?

Mr. Lisle: I don't quite understand what you mean by [fol. 34] "adjacent to New York Harbor".

The Referee: In New York water.

Mr. Lisle: I think the witness has already testified that all the employment of this claimant was on vessels on navigable waters of the Harbor of New York. Is that so, Mr. Van Emburg?

Mr. Van Emburg: Yes.

Mr. Lisle: Does that answer your question?

Mr. Rosen: I want a definite statement in the record as to actually where the different vessels on which Mr. Bergen worked during the period involved here were located, when they were loaded at Pier 43 North River, were they at the Battery, were they in Jersey City. I want to know exactly where they were then we can determine whether they were in the territorial limit of New York or not.

Mr. Van Emburg: You want that for every dollar earnings in these two years?

Mr. Rosen: Yes, I would.

Mr. Van Emburg: It is a mess, I tell you, to dig that up.

Mr. Lisle: These vessels, these elevators are really in a different case from the ships of the ordinary coastwise and transatlantic steamship companies because they don't tie up at any given pier. They go from place to place and sometimes two or three places in one day.

Mr. Rosen: But the elevator doesn't follow it around.

Mr. Lisle: Yes. The elevator moves from place to place.

[fol. 35] Mr. Rosen: The same ship?

Mr. Lisle: No. Any ship, the greater part of the business of the International Elevating Company is small elevations.

Mr. Van Emburg: Small lots, eight or sixteen thousand bushels. It takes us an hour or two to do the work and then we move to another pier, another steamship.

Mr. Lisle: It is a convenience to the steamship not to go and have to tie up at a pier at which there is a fixed elevator on the pier. It saves them going to such places and also some of these ships can't pull up beside the elevators. I presume their draft is too much. I don't know.

By the Referee:

Q. Did the claimant do any shore work at all?

A. Not at all—never worked on shore—not for us.

Q. How many men work on an elevator?

A. Well, about thirty-five.

Q. And all the men are members of the union?

A. The superintendent is not a member of the union. The rest are, I think.

Q. Have you contractual relations with the union?

A. Have we? Yes, we have.

Q. It is a closed shop?

A. Yes, it is.
Q. They supply all the men for the elevators?
A. Yes.
Q. And you pay according to the fixed union scale?
A. Fixed scale, according to an agreement.
Q. So many dollars per thousand bushels, is that it?
A. Yes.
Q. That's how much?
A. Five dollars per thousand straight time.

[fol. 36] The Referee: Do you want to question?
Mr. Lisle: There isn't much that I think I can question.
Mr. Rosen: I want to ask one series of short questions.

By Mr. Rosen:

Q. You know the name of one of these elevators that Bergen worked on?
A. "Themis".
Q. Give me the rank or the names of the jobs of the crew of all the personnel of that "Themis". There is a superintendent.
A. That's right.
Q. Then what?
A. Superintendent, millwright captain, engineer, fireman, deckhand, watchman and then twenty-eight trimmers, sometimes twenty-eight, sometimes less than twenty-eight —it varies a little—men can't always be reached you know at times might be twenty-seven or twenty-six.
Q. What is the duty of the captain?
A. The duty of the captain, steers the propellers around the harbor.
Q. Is he licensed?
A. He is a licensed captain, yes.
Q. He is a licensed captain?
A. Licensed captain, propeller.
Q. Is he a master within the ordinary meaning of the term in seafaring expressions?
A. I think so. He must be to get a license.
Q. Is he in charge of the elevator?
A. He is in charge of the elevator when it is moving on the water.
Q. And when the loading is being carried on, from one boat to another, is he in charge of the elevator?
A. No. The superintendent is in charge of everything.

[fol. 37] Q. Of the regular crew under the captain, who comprises that crew if there is such a thing?

A. Why, while the vessel is moving on the water, do you mean?

Q. Yes, when the master is in charge?

A. Well, the entire crew, the entire number of employees.

Q. All that you mentioned?

A. They are all subject to the orders of the superintendent, at all times. Of course, as far as navigation is concerned, the captain navigates the vessel but as far as going here, there, somewhere else, he is under orders of the superintendent or master.

Q. Superintendent or master. Did you say superintendent or master?

A. Whatever you want to call him. You sometimes say a master. The master is the man who has charge of the operations, controls all the employees on board.

Q. Mr. Van Emburg, when you say master do you mean the superintendent or the captain?

A. I mean the superintendent.

Q. Is he a licensed master?

A. Oh, no. He isn't a licensed master, not in the common sense of the word. Master means a man that operates a vessel, controls it.

Q. Yes.

A. He doesn't control the actual operation of the vessel around the harbor.

Mr. Rosen: Do you happen to know whether there are regular crew articles signed for these elevators?

Mr. Lisle: I don't know one way or the other but I have the impression from Mr. Van Emburg's previous testimony that they don't sign articles. I think he so testified.

[fol. 38] By Mr. Rosen:

Q. Where does the power come from that operates these buckets?

A. Power on the elevator steam engine or diesel engine.

Q. Regardless of whether or not one of these elevators is self-propelled, it still has power on it to operate these buckets?

A. Yes.

Q. Do the vessels move that power itself?

A. We have a generator, steam capstan.

Q. No connection, no lines connecting the vessel with the line in order to get power?

A. Oh, no.

The Referee: You have your own generator on each vessel?

A. Yes.

Mr. Rosen: I have no further questions for the moment, Mr. Eisen.

By the Referee:

Q. From what point are these grains delivered?

A. From what point?

Q. Yes.

A. It might come from the canal, Buffalo, it might come from the west shore, the Lackawanna. It is immaterial to us where it comes from. Grain and a harbor vessel put alongside our vessel. We don't care where it comes from.

Q. Your company has no interest in the vessels that bring in the grain?

A. No, nothing at all. No interest whatever. We transfer, that's all.

Q. Where do you operate principally, in what harbors do you operate?

A. New York harbor.

[fol. 39] Q. That is your principal harbor?

A. We don't go out of New York harbor.

Mr. Rosen: Did you go up the Hudson River part way, the East River or do you——

A. We go up the North River and East River.

Q. That's still adjacent to New York?

A. I call that New York harbor.

Mr. Rosen: There is the harbor itself and the rivers while adjacent to the harbor are not part of the harbor.

Q. What I am trying to bring out—it's adjacent to New York State—that's your principal work?

A. We don't go outside.

Q. You don't go on the Jersey side?

A. Oh, yes.

Q. But the principal work is in New York State?

A. I can't say that.

Q. What can you say?

A. I haven't any figure to indicate how much work is done in New York or how much in New Jersey.

Q. What proportion, just as a rough guess?

A. The only figure that I have on it is the figure that we make for New York State franchise tax and that according to where the elevators are on each day of the year, regardless of work—it is about ten per cent New York and ninety per cent New Jersey—but that isn't working all the time.

Mr. Rosen: Would you repeat what you said a moment ago. Would you read Mr. Emburg's answer. I was thinking of something else.

[fol. 40] (Stenographer reads Mr. Van Emburg's answer.)

By Mr. Rosen:

Q. From those records, Mr. Van Emburg, couldn't you tell us where the elevators were working on each day of the year?

A. Oh, yes. We have the records.

Q. Couldn't you pick out the elevators on which Mr. Bergen was working in the two years in question and give us the place?

A. We could.

Q. Is that much of a job?

A. I say it is.

By the Referee:

Q. You seem to make a distinction between the place where the elevator is stationed and the work performed?

A. Yes.

Q. How do you distinguish the difference there?

A. Well, we have to segregate the assets for New York State franchise tax. Wherever the elevator is is where the asset is on any particular day.

Mr. Lisle: May I ask one question?

The Referee: Yes.

By Mr. Lisle:

Q. When you say the elevator is in a certain place on a certain day, do you mean that that is the place where it spent most of the time?

A. Do you mean most of that day?

Q. Or do you mean it spent the entire day there?

A. Well, I couldn't say that. I couldn't say exactly—it moves from one place to another in a different day.

[fol. 41] Q. When railroads have to say where their freight cars are they figure out what they call an average daily presence in a definite state and notwithstanding the fact that a particular car might have been in two states in a given day they say it spent their entire day in one state. It is a simple way of deciding theoretically where the property is. Is that the theory you proceed on?

A. Well, I think the theory we proceed on is that we consider if it was in New York any part of the day that day goes to New York.

Q. I see.

A. After the elevator is through work they'd go to the pier in Jersey City.

By the Referee:

Q. Am I to understand that the work performed is principally in New York but for the purposes of the franchise tax you list the assets of the elevator and so forth with respect to Jersey. Is that what you mean?

A. Oh, no. I can't tell you what percentage were performed in New York and New Jersey in actual work. You'd have to figure down to the hours, hours occupied in working, wouldn't you, in New York and New Jersey?

By Mr. Rosen:

Q. But, Mr. Van Emburg. you stated a moment ago on the record when the boat isn't working, your boat, the elevator, is moored in Jersey?

A. Jersey City.

Q. So if your record shows that that boat at any time was in New York then that boat presumably was working at the time?

A. If it was at any time in New York, you say?

Q. Certainly. If the record shows the boat was in New [fol. 42] Jersey it wasn't working presumably?

A. Yes.

Q. Or anywhere out of the home port or home dock it must have been working?

A. Right, unless it went to drydock.

Mr. Lisle: I think Mr. Van Emburg misunderstood the first part of that question. When you say the boat is in New Jersey it doesn't necessarily mean that the boat is not working?

A. Not necessarily.

Mr. Lisle: It may or may not be working?

A. Yes.

Q. But if the boat is in New York it is unquestionably working?

A. Generally speaking, yes. There might be exceptions.

Q. There is another thing I'd like to ask you. How long does it take to load or unload one of these grain ships?

A. One of these grain boats?

Q. Yes.

A. One elevator can do around twelve thousand bushels an hour. If a grain boat has thirty thousand bushels in it while it is a simple——

Q. Does it ever happen that the elevator worked all day and all night unloading?

A. It has happened—rush jobs.

Q. I see. All right.

By the Referee:

Q. Where is that grain ultimately consigned to?

A. Any foreign port, Europe.

Q. Is it all to foreign trade?

A. Yes.

Mr. Lisle: Don't you have import work sometimes, Mr. VanEmburg?

[fol. 43] A. We have import work, loading grain out to foreign ports; we unload vessels also.

Mr. Lisle: I want to ask Mr. Van Emburg one question.

By Mr. Lisle:

Q. I understood in the past that you would occasionally be called upon to load or unload vessels lying in anchor?

A. Lying at anchor?

Q. Yes.

A. We have done that.

Q. And you will do that?

A. We can do that if the right position that we can handle it. It is a little too rough.

Mr. Rosen: You mean an anchor in the open waters of the harbor?

Mr. Lisle: That's right.

A. That's right.

By Mr. Rosen:

Q. How often does that happen?

A. Maybe once in ten years or so. I don't remember one case in the last twenty years. It might be more, I can't remember.

Q. The number of times that may occur is so rare that we could disregard it for this purpose?

A. Probably.

JOSEPH BERGEN, having first be-n duly sworn, testified as follows:

By the Referee:

Q. For whom did you work in 1938?

A. 1938, the International Elevating Company.

[fol. 44] Q. What kind of work do yon do?

A. I was a header on a ship.

Mr. Van Emburg: That's part of the trimming, isn't it, Joe?

A. Yes.

Q. Did you keep a record of your earnings in 1938 and 1939?

A. This was—this is 1940 these slips.

Q. You haven't answered my question. Did you keep a record for 1938 and 1939?

A. No, I have no record.

Q. Do you know how much you earned in those years?

A. No, I couldn't tell you that.

Q. The employer's records shows that you earned $809.44 in 1938 and $754.10 in 1939. Does that sound approximately right?

A. (No response.)

Q. Do you accept those figures as being correct?

A. Yes, sure.

Q. Could you describe to me briefly the type of work that you did?

A. Well, when a hold of ship is fill up in grain—you let the grain raise up in the hatch, you understand, in the hatch of the ship. Then the header would spout down the shoot the grain to the back of the hold to the bulkhead and then a man goes down with the board and takes it off and gets it to the far of the head and you can shovel it back.

Q. Am I to understand that all your work was in connection with the grain?

A. All my work is in connection with the grain. I have got about a hundred years' experience.

Q. Did it have any connection with the welfare of the vessel at all?

Mr. Lisle: I object to that.

The Referee: Overruled.

[fol. 45] A. We have men outside known as the trimming gang. The trimming gang is the gang that handles the grain.

Q. How did you reach the elevator each day?

A. It all depends. Most of the time we'd be sent to the Pier K or down to 5th Street or over to the American Export Lines. We go down the dock and over the ship and down the ladder and on the elevator.

Mr. Van Emburg: Don't you handle lines in any elevator?

A. Sometimes but——

Q. You mean those lines to shift the boat?

A. That ties the elevator to the ship.

Mr. Van Emburg: Don't you shift the grain boats too?

A. Yes, that comes under the heading of grain handle.

Mr. Van Emburg: You shift another by hand up to the position we need it in.

Q. Now, you return home every day after work?

A. Yes.

Q. What are your hours?

A. Eight hours is considered to be straight time. Anything over that is overtime.

Q. You never slept on the boat?

A. I did but I was too damn tired to go home.

Q. Is there a place to sleep on the boat?

A. Oh, yes, but there ain't what you call a bed or anything like that. You go and lie on the floor. You're too tired you don't care where you lay.

Q. Did you ever perform any work on the Jersey side?

A. Yes.

Q. What proportion, if you know, of the work that you [fol. 46] performed was on the Jersey side compared to New York?

A. You do a lot of work on the Jersey side.

Q. Can you estimate the proportion?

A. I couldn't estimate the proportion. No—you go to 5th Street—you might be there today, you might be there an hour and maybe two days or maybe a week.

Q. Where did you do most of your work, New York or New Jersey?

A. Mostly 5th Street, mostly around Jersey and New York—all around the harbor.

Q. What harbor do you have reference to?

A. New York harbor.

Q. Would you say it is mostly in New York harbor?

Mr. Lisle: I object.

A. I wouldn't say it is mostly in New York.

The Referee: These hearings are stripped of all technicalities.

Mr. Lisle: I think Mr. Bergen has answered the question as well as he can. If you could get him to say that it was mostly in New York it wouldn't be worth anything.

The Referee: I am not trying to lead him. I am trying to clear up the evidence.

A. (Continuing.) The work is done all around the harbor of New York City. From my understanding is that the elevator is not allowed to go up any further than Yonkers but how far up the East River they can go I don't know.

The Referee: Would you want to question Mr. Bergen?

[fol. 47] By Mr. Rosen:

Q. What elevator did you work on in 1938?

A. "Themis."

Q. Always the same?

A. (No response.)

Q. In 1938 did you always work on the "Themis" or did you work on any other elevator?

A. I think I worked on the "Themis." I am not quite sure—I think I worked on the "Themis" for over four, five years.

Q. Up to the present time?

A. Up to the present time. I can still go back there tomorrow if I am able to work.

Q. Mr. Bergen, is the "Themis" a self-propelled vessel?

A. Yes.

Q. It doesn't require a tug to take it from place to place?

A. No.

Q. Did you sign any articles, ships articles?

A. No.

Q. Do they feed you on the ship?

A. No.

Q. Where do you go to have your lunch?

A. Up to the restaurant.

Q. Where is the restaurant? Is it on the ship?

A. It is on the shore.

Q. How did you get from the elevator to the restaurant?

A. I don't have to go to the restaurant.

Q. How did you get from the elevator——

A. Down the gangplank, up the dock and to the restaurant.

Q. By foot?

A. By foot.

Q. Where do you live, Mr. Bergen?

A. I live 7314 Fifth Avenue, Brooklyn.

Q. Did you ever join your trimming crew on the ship or on the "Themis" when it was laid up or when it was stationed in New Jersey?

A. No. No, the trimming gang never go aboard the elevator in Jersey City unless they want to hang around.

[fol. 48] Q. Where do you join them?

A. We go down to the union meeting room in South Street. Then we telephone the office. If they have a job and then we go from the room on the job.

Q. Suppose the job is in Jersey City?

A. Well, it doesn't matter. You go to the job wherever it is, no matter where it is.

Q. Have you gone to many jobs from this meeting room that are located in Jersey?

A. Oh, yes.

Q. Tell me how you go.

A. Leave the place, go down the subway over to Carr Street.

Q. If you would answer the question so we could hear you it would help us.

A. I am doing the best I can.

Q. If the job was located in Jersey you went from the meeting room to Jersey at your own expense?

A. That's right.

Q. So you took the ferry or the Hudson Tubes or——

A. Yes.

The Referee: Did you do any shore work at all, Mr. Bergen?

A. No.

The Referee: Any questions?

Mr. Lisle: There was one question which Mr. Rosen asked that I am not quite sure of the answer on. I'd like to put it again and ask it again, if I may?

By Mr. Lisle:

Q. When there was a job in Jersey—was that your question?

Mr. Rosen: That's right.

Q. (Continuing.) How did you get to that job?

A. Which part of Jersey?

Q. Well, I don't know much about it.

[fol. 49] Mr. Van Emburg: Say 5th Street, Hoboken.

A. Go down to the Battery, you usually take the subway to the Battery, go up the Cortlandt Street, over the Hudson Street, then to the 5th Street pier.

By Mr. Rosen:

Q. Well, tell me, Mr. Bergen, where were you paid?

A. We were paid by the boss of the elevator. He used to pay us sometimes in the boat and sometimes the room.

Q. When you say the room, what do you mean?

A. I mean the union rooms.

Q. And that is located in New York City?

A. Yes.

Q. Is there any union room in Jersey that you frequented?

A. No.

Q. Let me ask you. Did you need any certificate or license in order to perform your work as a trimmer?

A. No.

Q. Mr. Van Emburg asked you if you handled any lines?

A. Yes, I have.

Q. What lines did you handle?

A. From what I understand at least one man of the trimming crew has to take a line from the elevator when she comes alongside of a ship.

Q. And then what do you do with that line?

A. We put it around to make the elevator fast—we put it around timberhead or something so that you can lead the elevator into the ship.

Q. When you started unloading the cargo ship into the big ship did you ever have to move the elevator?

A. Cargo ship?

Q. Don't forget we are not experienced in this kind of work—the grain boat.

A. The grain boat is moved.

[fol. 50] Q. Do you ever handle the lines?

A. No, only on the pipe on the ship.

Q. What's the pipe?

A. The pipe comes from the elevator to the ship and drops in the hold.

Q. As a matter of fact the only lines you handle are the lines that move the thing that runs the buckets?

A. Those are in the leg. I don't work on that side of the leg.

Mr. Van Emburg: It's dropped out on a yoke.

Q. All you handle are lines that moves that pipe, is that right?

A. Yes.

Q. And that's all you have to do in regard to lines?

A. Yes.

Mr. Van Emburg: Did you ever ship grain boats from one boat to another?

A. Yes. That's on the other side of the elevator—that has nothing to do with the men on the ship.

Mr. Van Emburg: But you do when the grain boats are around?

A. The boat gang, the ship gang—you take a boat man that hasn't been in a long while and send him on the ship and he is lost.

Mr. Van Emburg: All the trimmers do that work.

Mr. Lisle: May I ask Mr. Bergen a question. I think it would clear up the difficulty.

By Mr. Lisle:

Q. Do you work as a boat trimmer or ship trimmer?

A. Ship trimmer.

[fol. 51] Q. All the time?

A. Not all the time, not for twenty years ago.

Q. But during the period covered by—during the years 1938 and 1939 did you work as a ship trimmer or boat trimmer?

A. Ship trimmer.

By Mr. Rosen:

Q. Are the duties of a ship trimmer different from the duties of a boat trimmer?

A. Oh, yes, big difference.

Q. What's the difference?

A. Well, in the ship you got to go in no matter how dirty it is and shovel the grain—you got to go in and trim, load the ship, load the hold—put as much grain in the hold as possible.

By the Referee:

Q. What is the distinction between the ship trimmer and grain shoveler?

A. What is the difference between a ship trimmer and grain shoveler? Well, the grain shoveler is a man down in the boat. He handled what they call the steam shovel. He shovels the grain to the leg. Now you take a man on the ship, he takes the grain from the pipe and shovels it up to the bulkhead in the ship and the sides of the hold might be different sizes; of course, it makes harder work. At

times they run a lot of grain in the ship and the men certainly has a easy time of it.

Q. Did you ever perform any services as a grain shoveler?

A. Grain shoveler? Yes.

Q. On the elevator?

A. Yes.

Q. During 1938 and 1939?

A. No, not on the boats, on the ship—the ship side of the elevator.

Q. Was that during 1938 or 1939?

A. Yes.

[fol. 52] The Referee: Any more questions?

Mr. Rosen: I'd like to ask Mr. Van Emburg another question, Mr. Referee?

The Referee: All right.

FRANK VAN EMBURG, recalled.

By Mr. Rosen:

Q. Do the elevators have regular logs that they keep from day to day?

A. Yes.

Q. Wouldn't that log on the "Themis" and other boats show where that boat was on each day of the year?

A. It would.

Q. It would show what boats it was unloading and what boats it was loading?

A. What steamship it was loading and we have the records of the boats.

Q. I am just curious; that would give you an exact record, wouldn't it?

A. I have an exact record.

The Referee: Will you produce that record?

A. We can produce it, of course. What you want is what time it spent in one state or the other in a certain year.

COLLOQUY BETWEEN REFEREE AND COUNSEL

The Referee: That's correct.

Mr. Rosen: There are two things we'd like to have, Mr. Referee, that is for the year 1938 we'd like to determine

what part of the work of this claimant was performed in the State of New York—in other words where all or the greater part of his work was performed in 1938.

[fol. 53] The Referee: Not only for 1938 but up to June 3, 1939.

Mr. Van Emburg: 1938 to June 3, 1939?

The Referee: Thereafter the base of operations being from New York it wouldn't be much difference to the question at issue.

Mr. Van Emburg: Why June 3, 1939?

Mr. Rosen: As the Referee explained, the law changed.

The Referee: The law was amended effective June 3, and whether contributions are payable would depend on the base of operations rather than the greater portion of the work performed. So prior to June 3 it was solely on the proportion of work performed in New York State as compared to other states but after June 3 it is determined from the base of operations.

Mr. Van Emburg: Well, if these men are members of the crew of vessels they are exempt without regard to what state they work in.

The Referee: That's true.

Mr. Van Emburg: You contend that they are not?

The Referee: I haven't reached any conclusion.

Mr. Rosen: The Industrial Commissioner contends that whether or not they are members of the crew it is immaterial.

Mr. Lisle: Immaterial?

Mr. Rosen: Yes, if the work is performed on the navigable waters of the United States within the territorial limits of the State of New York.

[fol. 54] Mr. Lisle: Even though members of the crew?

Mr. Rosen: I say that is the contention of the Industrial Commissioner.

Mr. Lisle: May I have Mr. Van Emburg for a minute?

The Referee: Of course. The referee has residuary powers and may upset the rulings of the Industrial Commissioner.

Mr. Rosen: That was the ruling of the Industrial Commissioner.

Mr. Lisle: I think I have some material here that would help the referee at arriving at a decision.

The Referee: Do you want to submit anything on record?

Mr. Lisle: Yes, I would very much.

By Mr. Lisle:

Q. I show you a letter from the Treasury Department, Washington, January 30, 1937, addressed to the International Elevating Company and signed by D. S. Bliss, Deputy Commissioner. Was this letter received by you in response to various requests for a ruling as to the status of your employees on the elevators?

A. Yes.

Q. Would you tell the Referee the previous background of this letter? This letter states that certain rulings described have been reconsidered and as a result of reconsideration are hereby revoked. Can you tell the Referee to what rulings that refers? Do you remember?

A. You mean to read this letter?

Q. No.

The Referee: Off the record.

[fol. 55] (A brief discussion ensued off the record.)

Mr. Rosen: May I suggest the letters and rulings be submitted in evidence so they can speak for themselves?

Mr. Lisle: I have a copy.

Mr. Rosen: I'd rather have Mr. Eisen read them into the record.

Mr. Lisle: Might I suggest that the Referee read it in in view of the fact that it is an original letter?

The Referee: A letter dated January 14, 1937 on the stationery of the Treasury Department, Washington, addressed to International Elevating Company, 8 Broadway, New York, New York. Attention Mr. E. C. Burgess, Jr., Treasurer. "Sirs:—"

Mr. Rosen: It seems to me that this isn't evidence that you can't take the copy for consideration without——

The Referee: If Mr. Rosen doesn't object to it?

Mr. Rosen: I haven't any objection if I am assured that it is a copy of it but I refuse unless that is an exact copy.

Mr. Lisle: If it had been prepared in my office I'd be able to say it is an exact copy.

Mr. Van Emburg: Can't we check it here?

The Referee: A comparison of the copy with the original indicates that it is an exact copy. This copy is received for the claims folder for the Employer's Exhibit 1 and made a part of the record. Anything else you want to put on record?

Mr. Lisle: Yes. There is another matter that I think will be helpful to the Referee.

[fol. 56] By Mr. Lisle:

Q. I have here, Mr. Van Emburg, a copy of a letter to the International Longshoremen's Association, attention Mr. Joseph P. Ryan. Will you tell me, will you tell the Referee rather, what were the circumstances of your obtaining that letter, that copy?

A. We requested Joseph P. Ryan to communicate with Washington and find out the status of these trimmers. This is the copy of the reply received.

The Referee: No objection to receiving this?

Mr. Rosen: Yes, I have objection. This is a copy. I don't know where the original is.

A. That is the copy we got from Ryan. Mr. Ryan has the original.

COLLOQUY BETWEEN REFEREE AND COUNSEL

Mr. Rosen: I have no objection to it.

The Referee: Will you read the contents and see whether you want to object?

Mr. Rosen: That is addressed to the union and I don't see what materiality it has.

The Referee: Suppose they submit the copy for what it's worth. Letter dated May 14, 1937, addressed to the International Longshoremen's Association, 265 West 14 Street, alleged to be a copy of the original which is in the possession of the Association, is received for the claims folder as the Employer's Exhibit 2 and made part of the record. Anything else that you want to submit?

Mr. Lisle: If the Referee would find it helpful we also [fol. 57] have a letter here from the Department of Labor in the State of New York, having to do with the same question. It is from Harry K. Hurwitz and dated April 1, 1936. Do you wish to see it?

(Referee hands letter to Mr. Rosen for inspection.)

Mr. Rosen: Well, your Honor, seeing that this letter came from the Controller of the Division of Placement and Unemployment Insurance I can't very well object to it. However, this is an answer to certain letters. I would sug-

gest that this letter be not regarded complete until we have the copies of the letters to which it is a reply. Have you those copies available, counselor?

Mr. Lisle: The company has I believe.

Mr. Van Emburg: Our letters January 9 and February 3.

Mr. Lisle: Of course, your department will have the original of those letters. All we can give are the copies of those or copies of those copies if that would be sufficient.

Mr. Rosen: That would be sufficient, yes.

The Referee: Of course, you understand that any administrative ruling is not binding on the claimant being ex parte. Since there is no objection to the receipt of this letter in question I will receive it for the claims folder marked Employer's Exhibit——

Mr. Lisle: We can't submit that. We haven't a copy of it.

The Referee: I will allow you to read this letter into the record.

[fol. 58] Mr. Rosen: Incidentally, your Honor, the rulings of the Department of Internal Revenue are not binding on the Division of Placement and Unemployment Insurance in the State of New York. I haven't objected to the admission in evidence of those other letters simply to be considered what they are worth. We do not concede that they are binding.

The Referee: That's exactly how I am accepting that.

Mr. Lisle: I asked the stenographer to copy it.

The Referee: Copy that, please.

EMPLOYER'S EXHIBIT 3

(The following was copied by the reporter):

"State of New York, Department of Labor, Division of Unemployment Insurance, Albany, New York, N. Y., April 1, 1936. International Elevating Company, 2 Broadway, New York, N. Y., Attention Mr. F. N. Van Emburg, Assistant Treasurer. Gentlemen: I wish to reply to your letters of January 9 and February 3.

"It is desired that you submit to us certain definite information with respect to the employment of all of your employees showing the time worked and wages earned. Such records of payrolls as you now keep would be sufficient for our purposes provided that they give identical information as required in the instructions we sent you on

December 3. In the case of piece workers where you cannot indicate the actual number of hours worked merely indicate in the column entitled hours worked, piece workers.

[fol. 59] "Only employees who perform all or the greater part of their work within New York State are covered by the New York Unemployment Insurance Law regardless of their place of residence. Employees who perform a minimum or part of their work within New York State are not covered.

"However, the question of our jurisdiction of employees working on vessels operating in the navigable water of the United States may be involved. Employees thus employed are not covered by the law. Our jurisdiction, however, will extend to such employees as longshoremen, harbor workers and those whose work is partly in maritime water and partly on shore.

"The form which you submitted is not required by this division at the present time. However, if you wish to use this form in your record keeping there is no objection. Yours very truly, (Signed) Harry G. Hurwitz."

Mr. Lisle: May I make that short statement that I wanted to make at the beginning, Mr. Referee?

The Referee: All right, you may.

Mr. Lisle: I will try to make it not in the nature of an argument but in the nature of a statement of background so that it would be more helpful to you. When the Unemployment Insurance Law went into effect this employer realized that there was a serious question as to the status of its employees on the elevators and that includes the trimmers. For some time, because of the difficulty of the question, they paid the tax and made the necessary returns. [fol. 60] Isn't that so, Mr. Van Emburg?

The Referee: Is that to the New York State Unemployment Insurance?

Mr. Lisle: You paid to New York?

Mr. Van Emburg: We paid old age. I don't know whether we paid New York. I wouldn't swear to it.

Mr. Lisle: Will you strike that out then where I said that they paid the unemployment tax before. Social security taxes were paid to the federal government under Title VIII certainly. However, an effort was made to get rulings as to the status of these employees and certain of these rul-

ings which are unequivocal in character have been referred to the Referee. They took the form of letters from the Deputy Commissioner of Internal Revenue and as far as the ruling of the Division of Unemployment Insurance, although it is not entirely clear the statement is made that the jurisdiction of the Industrial Commissioner merely extends to such employees as longshoremen, harbor workers and those whose work is partly in maritime *workers* and partly on shore. Now in view of the fact that the individuals employed on the elevators are employed entirely on the navigable waters of the United States and never on shore the company assumed that they were within the exemption of maritime employees, that their employees were exempt as maritime employees. The question raised is one which has already been before the Unemployment Insurance Appeal Board in a very similar case. The Unemployment Insurance Appeal Board held——

[fol. 61] Mr. Rosen: What case is that?

Mr. Lisle: I'll give you that case in just a moment. They held that an employee on a steam derrick engaged in unloading and transporting machinery and heavy objects in a shipyard was engaged in maritime employment and therefore not subject to the Unemployment Insurance Law.

The Referee: What is the number of the case?

Mr. Lisle: That was Case No. 607-39, 537-34-39R. The name of the claimant was Carl J. Nilsen.

The Referee: Anything else you want to say?

Mr. Lisle: Is there anything you can think of Mr. Van Emburg?

Mr. Rosen: Mr. Referee, I want to refer to one statement made by Mr. Lisle. If this employer relied on the letter from this division dated April 1, 1936, I would say his reliance on that was premature in view of a paragraph contained in that letter which said, "Our jurisdiction, however, will extend to such employees as longshoremen, harbor workers, etc."

Mr. Lisle: Read the et cetera, Mr. Rosen, please.

Mr. Rosen: "And those whose work is partly in maritime waters and partly on shore."

Mr. Lisle: Yes.

Mr. Van Emburg: These men are not longshoremen.

Mr. Rosen: Are they harbor workers?

[fol. 62] Mr. Van Emburg: They are a crew of the elevator, part of the crew which the elevator cannot operate without.

The Referee: This letter also states that it is desired that you submit to us certain definite information with respect to the employment of all employees. Has that information been submitted?

Mr. Lisle: Mr. Van Emburg——

The Referee: This letter dated April 1, which is marked for identification as the Employer's Exhibit 3, says it is desired that you submit to us certain definite information with respect to the employment of all your employees showing the time worked and the wages earned. Was this information ever submitted to the Division of Unemployment Insurance?

Mr. Van Emburg: It would have to be submitted in the report, wouldn't it?

The Referee: You don't know whether you followed that up in any way?

Mr. Van Emburg: I can't say off hand.

Mr. Lisle: I might say——

The Referee: Evidently the ruling there is inconclusive. They expected certain information from you.

Mr. Lisle: If the Referee please, the company made very, very assiduous effort to find out what the status of its employees in the elevators was under the federal law and having obtained a ruling that these employees were maritime employees within Title IX, Section 907, Section 3c it was assumed on the basis of a ruling of the Attorney General of the State of New York that the position of New York would follow that of the federal government and it was [fol. 63] counsel's advice at the time in view of these rulings it would be entirely proper to assume that these men were exempt.

The Referee: Is this said to——

Mr. Lisle: This is an explanation.

The Referee: —show extenuating circumstances? You recognize that such a letter cannot be conclusive in itself.

Mr. Lisle: Oh, absolutely but I don't think it is quite proper to say it is to extenuate our position because I never conceded that there is anything that needs to be extenuated.

The Referee: We won't go into that matter just now. Is there anything else?

JOSEPH BERGEN, recalled.

By Mr. Rosen:

Q. When you first get on the elevator, if that elevator is moored to the dock and it then starts moving over to the grain ship, do you have any work on that elevator?

A. No.

Q. What do you do?

A. Just trim grain.

Q. But on the elevator before it goes over and ties up?

A. When the elevator goes alongside the ship?

Q. Before that?

A. Nothing.

Q. Nothing at all?

A. Nothing.

Q. That is all.

The Referee: Any further questions?

Mr. Lisle: I'd like to ask Mr. Bergen some questions.

By Mr. Lisle:

Q. Would your answer to that question be true for all the [fol. 64] trimmers? Aren't there some trimmers that travel with the elevator?

A. At their own expense.

Q. I see. But once you start to work, when you start to work in the morning, you go to where the elevator—to where the job is?

A. Yes.

Q. Suppose you finish that job—suppose you finish that job at eleven o'clock in the morning and there is another job—say your first job was at a pier in the North River and your second job is in Jersey, would you go with the elevator?

A. You're expected to go on shore and go over by boat but instead of that the men stay on and go across with the elevator.

Q. But you do travel with the elevator?

A. Yes, sure. It is quicker. You have to have the grain on by a certain time and it is quicker for us to get over there. It makes a lot of trouble and the man is pretty well tired out and when he is over there he isn't fit to work.

By Mr. Rosen:

Q. You said at one's own expense a moment ago. What do you mean?

A. When he goes from the room to the job it is all his own expense.

Q. Assuming that one job is finished at eleven o'clock in the morning and you stay on the elevator and you are conveyed to another job that job starts at three o'clock in the afternoon, are you paid for the hours between eleven and three?

A. No, only while grain is being going from the pipe into the ship.

Q. So for those three or four hours between jobs that you remain on the elevator you are a passenger on the vessel?

A. Yes.

Mr. Van Emburg: I don't think so, Mr. Rosen.

[fol. 65] By the Referee:

Q. The rate of pay is determined solely by the amount of bushels that are handled?

A. Yes.

Q. And not by any other work?

A. I will give you some dope on it.

Q. What is your answer to that question?

A. Yes, that's right.

By Mr. Rosen:

Q. When you travel, Mr. Bergen, from one job to another on the grain elevator, do you pay for your passage?

A. It depends on how far it is.

Q. When you travel on the grain elevator do you pay for your passage?

A. No.

Mr. Lisle: In other words, if you have a job at the foot of Manhattan and you go over to Jersey some place on the elevator you travel free?

A. Yes. You're right.

Mr. Van Emburg: You are not a passenger?

A. Not a passenger.

Mr. Van Emburg: Member of the crew.

Q. Do you have any work to perform while you are traveling?

A. No.

Q. Do you perform any work while you are traveling?

A. No.

Mr. Van Emburg: He is a deckhand.

Mr. Rosen: I am interested in this particular case, Mr. Van Emburg.

The Referee: Am I to understand that you will submit the proportion of the work in New York as compared with that of New Jersey with respect to the claimant?

[fol. 66] Mr. Van Emburg: With respect to Mr. Bergen for 1938 up to June 3, 1939—we can dig it out I suppose. It is quite a sweet job though.

The Referee: What form shall we submit it by, affidavit form?

Mr. Rosen: Whatever form is acceptable to you, your Honor. The only point is this. Up to June 3, 1939 if they can satisfy you that all or the greater portion of this man's work was performed outside the State of New York he is not entitled to benefits. Subsequent to June 3, 1939 we are interested more in the exact location of each day's work.

The Referee: Now, shall we adjourn this case for the purpose of securing that additional information or is it satisfactory to you that the employer submits it in affidavit form?

Mr. Rosen: It doesn't matter to me. I am sure that if it is submitted in affidavit form and taken from the records that that would be an exact transcript if the employer says so. However, we have the claimant here.

The Referee: We'll inquire from the claimant if he objects to the procedure?

By the Referee:

Q. Is it satisfactory to you to accept the affidavit of the employer with respect to the performance of the work?

A. Providing it is a true application I will agree to it. I say if it is a true application I will agree to it.

Q. You either accept the affidavit as true——

A. I mean if it is a true one I will accept it.

[fol. 67] Q. Do you wish to examine it?

A. I certainly do.

Mr. Lisle: Might I suggest that we send—prepare it in affidavit form and send a copy to Mr. Bergen and give him a few days to make any objections and then if it is all right we will submit it in affidavit form. It will be much more useful than by having it in questions and answers.

Q. Is that agreeable to you?
A. That is agreeable.

The Referee: You will submit an affidavit for the record and serve a copy on the claimant and if there are no objections within ten days of the date of its receipt and the date that it is filed with this department I will proceed to close the case and render decision. Is that satisfactory to you?
Mr. Rosen: It is satisfactory to me.
The Referee: Is that satisfactory to all parties here?
Mr. Lisle: Yes.
Mr. Van Emburg: Yes.
Mr. Bergen: Yes.
The Referee: Case adjourned awaiting receipt of the affidavit.

Certified to be a true and correct copy of the transcript of minutes.

Libby Goldberg, Hearing Stenographer.

Transcribed 7/1/40.

[fol. 68] BEFORE DIVISION OF PLACEMENT AND UNEMPLOYMENT INSURANCE

[Title omitted]

AFFIDAVIT OF F. N. VAN EMBURG

STATE OF NEW YORK,
County of New York, ss:

F. N. Van Emburg, being duly sworn, deposes and says:

He is the Assistant Treasurer of International Elevating Company, the employer of the above claimant, and is familiar with the facts of the employment of said claimant.

This affidavit is made for the purpose of supplying data to the Referee of the Industrial Commissioner in connection with the claim of Joseph Bergen aforesaid to unemployment insurance benefits under Article 18 of the Labor Law of this State.

The earnings of Joseph Bergen while he was in the employ of International Elevating Company for the whole of the year 1938 and for the period from January 1 to June 3, [fol. 69] 1939, are allocated to the States of New York and New Jersey as follows:

	New York	New Jersey
1938	$636.88	$253.56
1939	94.59	57.77

Earnings have been allocated as above set forth to the State adjacent to which the services of the claimant were performed. All services were performed on vessels on the navigable waters of the United States, and no services were performed ashore either in the State of New York or New Jersey

Deponent makes the above statement of earnings and the above allocation on the basis of an examination of the records of the employer, International Elevating Company.

The elevators of International Elevating Compan[illegible] are all registered at the New York Custom House, as is the case with all vessels plying waters of New York Harbor and tributary streams. This being the case, the home port of the elevators, your deponent is informed, is New York City; however, the hailing port of the elevators of International Elevating Company is Jersey City, New Jersey.

F. N. Van Emburg.

(Sworn to June 18, 1940.)

[fol. 70] EMPLOYER'S EXHIBIT 1

Copy

Treasury Department

Washington

MT:SS:R Jan. 14, 1937.

International Elevating Company, 8 Broadway, New York, N. Y.

Attention Mr. C. E. Burgess, Jr., Treasurer

SIRS:

Your attention is directed to Bureau letters dated November 25, 1936, and December 5, 1936, which contain rulings to the effect that services performed by individuals on floating

grain elevators are not rendered as an officer or member of a crew serving on board a vessel in connection with its operation and welfare and do not come within the excepted class as set forth in Sections 907(c)(3) and 811(b)(5) of the Social Security Act.

You are advised that such rulings contained in the above mentioned Bureau letters have been reconsidered and as a result of reconsideration such rulings are hereby revoked.

Accordingly, with respect to Title IX of the Act, services performed as an officer or member of the crew of such vessels on the navigable waters of the United States are excepted and with respect to Title VIII of the Act services performed as an officer or member of the crew of such vessels which are documented under the laws of the United States or any foreign country are excepted.

Respectfully, D. S. Bliss, Deputy Commissioner.

cc Collector, Customhouse, New York, New York.

[fol. 71] EMPLOYER'S EXHIBIT 2

Treasury Department

Washington

May 14, 1937.

International Longshoremen's Association, 265 West 14th St., 19th Floor, New York, N. Y.

Attention: Mr. Joseph P. Ryan, International President

SIRS:

Reference is made to your letter dated March 5, 1937, relative to the provisions of Section 811(b)(5) of the Social Security Act.

It is stated that certain individuals employed by the International Elevating Company are "grain trimmers" employed by the owner of floating grain elevators and permanently attached to such elevators when working. Their work is performed entirely on navigable waters and in connection with the elevating of grain by such floating elevators in and about the port of New York.

A ruling is requested as to whether such "grain trimmers" are considered as "officers or members of the crew"

within the exception contained in Section 811(b)(5) of the Social Security Act.

You are advised that it is the opinion of this office that services performed by "grain trimmers" on documented floating grain elevators are excepted from "Employment" under Section 811(b)(5) of the Act. Accordingly, no liability for tax under Title VIII of the Act is incurred with respect to such service.

Respectfully, D. S. Bliss, Deputy Commissioner.

cc Collector, Customhouse, New York, New York.

[fol. 72] AFFIDAVIT OF NO OTHER OPINION

STATE OF NEW YORK,
County of Kings, ss:

Francis J. Gilbride, Jr., being duly sworn, deposes and says:

I am an Attorney and Counselor-at-law associated with Cullen & Dykman, Attorneys for Appellant herein, that no other opinion except the decision of the Unemployment Insurance Appeal Board, dated December 6, 1940, and the decision of the Unemployment Insurance Referee, dated July 9, 1940, printed herein at pages 5 to 12 and 15 to 19, respectively, was rendered.

Francis J. Gilbride, Jr.

Sworn to before me this 7th day of August, 1941.
Fred L. Space, Notary Public, Richmond County.
Certificate filed in Kings County.

[fols. 73-74] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing papers are true and correct copies of the originals on file in the office of the State Department of Labor and of the whole thereof, and constitute and include the notice of appeal to the Appellate Division, and all of the papers, reports, records, documents and evidence which were before and were acted upon by the Division of Placement and Unemployment Insurance, Un-

employment Insurance Appeal Board of the Department of Labor of the State of New York upon the consideration and determination of the claim of Joseph Bergen for compensation under the Unemployment Insurance Law, against International Elevating Company, and the certification thereof by the secretary of the State Department of Labor is hereby waived.

Dated, New York, August 8, 1941.

Cullen & Dykman, Attorneys for Appellant. Hon. John J. Bennett, Jr., Attorney General, Attorney for Respondent.

[fol. 75] In Supreme Court of New York, Appellate Division

Notice of Appeal as of Right to Court of Appeals—January 23, 1942

[Title omitted]

Sirs:

Please take notice that Frieda S. Miller, as Industrial Commissioner, hereby appeals to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, made and entered on the 10th day of December, 1941, reversing the decision of the Unemployment Insurance Appeal Board of the New York State Department of Labor, dated December 6, 1940, and [fol. 76] that the said Appellant hereby appeals from the whole and from each and every part of the said order.

Dated: Albany, New York, January 23, 1942.

Yours, etc., John J. Bennett, Jr., Attorney General, Attorney for Appellant, The Capitol, Albany, New York; by W. Gerard Ryan, Assistant Attorney General, 112 State Street, Albany, New York.

To: Cullen & Dykman, Esqs., Attorneys for Employer-Respondent, 177 Montague Street, Brooklyn, New York; Joseph Bergen, Claimant, 7314 Fifth Avenue, Brooklyn, New York; Unemployment Insurance Appeal Board, 342 Madison Avenue, New York, New York; Clerk, Appellate Division, Court House, Albany, New York.

[fol. 77] In Supreme Court of New York, Appellate Division

Order Appealed From—September 15, 1941

[Title omitted]

The Appellant above named, having appealed to this Court from the decision of the Unemployment Insurance Appeal Board, Department of Labor, made December 6, 1940, in favor of the above named Claimant, and said appeal having come on to be heard in this Court, and due deliberation having been had thereon,

Now, on the motion of Cullen & Dykman, attorneys for International Elevating Company, the Employer above named,

[fol. 78] It is unanimously Ordered that the decision appealed from be and the same is hereby reversed with costs to the Employer.

John S. Herrick, Clerk. (Seal.)

A true copy. John S. Herrick. Ent. 12/10/41, Clerk.

In Supreme Court of New York, Appellate Division

Decision of Appellate Division—November 12, 1941

In the Matter of the Claim for Benefits under Article 18 of the Labor Law Made by Joseph Bergen, Claimant,

v.

International Elevating Company, Appellant,

Frieda S. Miller, as Industrial Commissioner, Respondent

Decision of the Appeal Board reversed, with costs.
Opinion by Schenck, J.
Hill, *P. J.*, Crapser, Bliss and Heffernan, *JJ.*, concur.

[fol. 79] In Supreme Court of New York, Appellate Division

Opinion for Reversal

In the Matter of The Claim for Benefits under Article 18 of the Labor Law, Made by Joseph Bergen, Claimant,

International Elevating Company, Employer, Appellant,

Frieda S. Miller, Industrial Commissioner, Respondent

Argued September Term, 1941.
Decided , 1941.

Hon James P. Hill, Presiding Justice.
Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Heffernan, Hon. Gilbert V. Schenck, Associate Justices.

Appeal by Employer-Appellant, from a decision of the Unemployment Insurance Appeal Board affirming the decision of the Unemployment Insurance Referee holding that claimant worked in employment subject to the Unemployment Insurance Law.

Cullen & Dykman, Attorneys for Appellant, No. 177 Montague Street, Brooklyn, N. Y. (Arthur E. Goddard, Harry G. Hill and Robert B. Lisle, of Counsel).

[fol. 80] John J. Bennett, Jr., Attorney General, Attorney for Respondent, Albany, N. Y. (Henry Epstein, Solicitor General; W. Gerard Ryan and Francis R. Curran, of Counsel).

Schenck, j.:

This is an appeal by International Elevating Company, an employer, from a decision of the Unemployment Insurance Appeal Board which affirmed a decision of a Referee holding the claimant herein to be entitled to benefits under the Unemployment Insurance Law (Labor Law, art. 18, §§ 500-539) of New York State. The controversy is in regard to the question of whether the claimant was or was not engaged in the maritime field on navigable waters of the United States in such manner as to be outside the scope of the power of the State of New York in this respect.

The claimant was employed as a "grain trimmer" in connection with the operation of floating grain elevators owned and operated by the employer herein. The elevators were used in the business of loading and unloading grain to and from vessels in the harbor of New York. In brief, the business of the employer was to transfer grain from one vessel to another as, for example, to transfer a cargo of grain from an ocean going ship to a barge for further transportation. The elevators used in the business are self-propelling. They are made fast to the steamship from which or to which the transfer is to be made while the ship is at the pier. Thereupon the vessel to which or from which the grain is to be transferred comes alongside the elevator and the transfer is made via the elevator.

[fol. 81] Trimmers, such as claimant, work not only on the elevator itself but also in the holds of the discharging or receiving vessels. They operate steam shovels which push the grain to the elevator "leg," see to the "trimming" of the grain in the two holds, handle ship lines and perform other similar duties. They never work on shore. Some of the piers at which the elevators are used are located in New York. Others are in New Jersey. Claimant has worked at piers in both states during the period involved herein.

Under the foregoing facts, it seems clear to me that this claimant has been engaged in interstate commerce on the navigable waters of the United States. He is accordingly not subject to the jurisdiction of either New York State or New Jersey (although under the decisions of the Board he might be subject to both), but rather is subject solely, in respect to the matter in controversy here, to the admiralty and maritime jurisdiction of the United States.

This jurisdiction is pursuant to section 2 of article III of the Constitution of the United States. It cannot be delegated to the several States. The grant of admiralty jurisdiction to the federal government was: "* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *." (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.) This purpose would be violated if the Board's decision herein were upheld.

The New York Workmen's Compensation Law has been held inapplicable to carpenters, rockloaders, boiler-workers,

and watchmen on various types of vessels, engaged in oper-
[fol. 82] ations similar to those here, on the ground that they were engaged in maritime employment. (See *Matter of Doey v. Howland Co.*, 224 N. Y. 30; *Matter of Keator v. Rock Plaster Manufacturing Co., Id.* 540; *Norman v. Merritt & Chapman Derrick & Wrecking Co.*, 200 App. Div. 360.)

There is no basic distinction between the Unemployment Insurance Law and the Workmen's Compensation Law so far as fundamental jurisdiction is concerned. It follows that the employer herein cannot be subjected to the New York State Unemployment Insurance Law. The decision of the Board must, accordingly, be reversed.

It is unnecessary to go into the Federal and State statutes that might otherwise be involved. Suffice to say that Title IX of the former Social Security Act excepts from the term employment, "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Internal Revenue Code [U. S. Code, tit. 26], § 1607, subd. [c], ¶[4].) This is superfluous in view of the above mentioned constitutional provision upon the point but is referred to as being an additional ground for reversal here.

Decision of Unemployment Insurance Appeal Board should be reversed, with costs.

[fol. 83] In Supreme Court of New York, Appellate Division

Affidavit of No Further Opinion

State of New York,
County of Albany, ss:

W. Gerard Ryan, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of John J. Bennett, Jr., Attorney General of the State of New York, attorney for appellant herein, and that no opinion was handed down by the Appellate Division in deciding this appeal, except the opinion for reversal by Schenck, J. as hereinbefore printed.

W. Gerard Ryan.

Sworn to before me this — day of April, 1942.

Harold F. Lee, Notary Public, Albany County.

In Supreme Court of New York, Appellate Division

Stipulation Waiving Certification to the Court of Appeals

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the papers on appeal to the Appellate Division, Third Department, the order of the Appellate Division appealed from, the opinion for reversal of the Appellate Division, and the notice of appeal as of right to the Court of Appeals, all of which are now on file in the office of the Department of Labor and in the office of the Clerk [fol. 84] of the Appellate Division, Third Department, Albany, New York, and that certification thereof is hereby waived.

Dated Albany, New York, April —, 1942.

John J. Bennett, Jr., Attorney General, Attorney for Appellant, by W. Gerard Ryan, Assistant Attorney General. Cullen & Dykman, Attorneys for Employer-Respondent.

[fol. 85] In Court of Appeals of New York

Remittitur—October 16, 1942

State of New York, ss:

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 15th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Forty-two, Before the Judges of Said Court

Witness, the Hon. Irving Lehman, Chief Judge, Presiding

John Ludden, Clerk

Remittitur—October 16, 1942

In the Matter of the Claim for Benefits under Article 18 of the Labor Law, Made by Joseph Bergen

Be it Remembered, That on the 12th day of May in the year of our Lord one thousand nine hundred and forty-two Frieda S. Miller, as Industrial Commissioner the appellant

in this cause, came hereunto the Court of Appeals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And International Elevating Company the respondent in said cause, afterwards appeared in said Court of Appeals by Cullen & Dykman, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein, of counsel for the appellant, and by Mr. Jules Haberman, of counsel for the respondent, and after due deliberation had thereon, did [fol. 86] order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and determination of Unemployment Insurance Appeal Board affirmed with costs in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order of Appellate Division be reversed and determination of Unemployment Insurance Appeal Board affirmed with costs in this court and in the Appellate Division, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, October 16, 1942

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 87] IN THE COURT OF APPEALS OF NEW YORK

OPINION—October 15, 1942

In the Matter of the Claim of MIKE CASSARETAKIS

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant; Standard Dredging Corporation, Respondent, and Five Other Cases

Appeals from two orders of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1941 and December 10, 1941, respectively, which reversed decisions of the Unemployment Insurance Appeal Board determining that the claimants worked in employments subject to the unemployment insurance law (Labor Law, art. 18 [Cons. Laws, ch. 31]) and were entitled to be credited with their earnings in such employments as a basis for unemployment insurance benefits.

Appeal, by permission, from four orders of the Appellate Division of the Supreme Court in the third judicial department, entered November 19, 1941, each of which unanimously affirmed a decision of the Unemployment Insurance Appeal Board determining that the claimant in each such proceeding did not work in an employment subject to the unemployment insurance law (Labor Law, art. 18 [Cons. Laws, ch. 31]) and was not entitled to be credited with his earnings in such employment as a basis for unemployment insurance benefits.

John J. Bennett, Jr., Attorney-General (*Henry Epstein, W. Gerard Ryan* and *Francis R. Curran* of counsel), for appellant.

H. Maurice Fridlund, Jules Haberman, Frank C. Mason, Edward K. Bachman, James Ragan Roberts, Arthur E. Goddard, Robert B. Lisle and *Edward L. P. O'Connor* for respondents.

FINCH, J.:

These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws. ch. 31), imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been employed as members of the crews of vessels on the navigable waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and *Matter of Bergen*) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty [fol. 88] clause of the Federal Constitution, the unemployment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, § 502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, § 1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or member of a crew of a vessel upon the navigable waters of the United States.

Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, § 534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson

was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the [fol. 89] Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, tit. 26, §§ 1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State government contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State. (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495.)

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578-583; *Carmichael* v. *Southern Coal & Coke Co., supra; Patton* v. *Brady*, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael* v. *Southern Coal & Coke Co.*, Mr. Justice Stone (now chief justice) said: "Taxes • • • may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.* case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the [fol. 90] Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of

the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument." (p. 508.)

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; *first*, the State law is alleged to interfere with and burden maritime commerce in its national and international aspects as to which Congress alone has power to legislate; *second*, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III, of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley* v. *Board of Wardens*, 12 How. [U. S.] 299.) One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (*Western Union Telegraph Co.* v. *Attorney-General*, 125 U. S. 530), and this is so even though such commerce is maritime in nature. (*Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in *Perkins* v. *Pennsylvania*, (314 U. S. 586, affg., 342 Penn. St. 529) the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in *Southern*

Pacific Co. v. *Jensen*, 244 U. S. 205, it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state purpose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained [fol. 91] therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the *Jensen* case. In *Just* v. *Chambers* (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the *Jensen* case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, *a fortiori*, the legislation in the case at bar may not be held to have overridden the limitations set forth in the *Jensen* case.

Respondents point to a line of authorities (*Southern Pacific* v. *Jensen, supra; Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in *Matter of Doey* v. *Howland Co.* (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on

the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke,* 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (*People ex rel. Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies (*Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 Fed. Rep. [2d] 121); taxes upon shipping (*Transportation Co.* v. *Wheeling,* 99 U. S. 273); and tolls levied upon interstate and for- [fol. 92] eign shipping using state-improved waterways. (*Sands* v. *Manistre River Improvement Co.,* 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code, tit. 26), the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In *Savage* v. *Jones* (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State Act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taxing only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing [fol. 93] the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection or else that it would be impracticable or impolitic

to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Steward Machine Co.* v. *Davis, supra,* at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation system both as to the kind and extent of coverage provided. This broad policy may not be overriden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in

accordance with this opinion, all with costs in this court and in the Appellate Division.

LEHMAN, Ch. J., LOUGHRAN, RIPPEY, LEWIS, CONWAY and DESMOND, JJ., concur.

Ordered accordingly.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[fol. 94] At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Department, held at the Court House, City of Albany, State of New York, commencing on the 21st day of September, 1942.

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Hefferman, Hon. Gilbert V. Schenck, Associate Justices.

In the matter of the Claim for Benefits under Article 18 of the Labor Law, made by JOSEPH BERGEN, Claimant,

INTERNATIONAL ELEVATING COMPANY, Employer-Respondent

FRIEDA S. MILLER, Industrial Commissioner, Appellant

ORDER AND JUDGMENT ON REMITTITUR—September 21, 1942

Appellant above named having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, Third Department, entered in the office of the Clerk of said Court on the 10th day of December, 1941, unanimously reversing the decision of the Unemployment Insurance Appeal Board of the New York State Department of Labor, dated the 6th day of December, 1940, with costs against the Industrial Commissioner; and the said appeal having been argued at the Court of Appeals by John J. Bennett, Jr., Attorney General, Henry Epstein, Solicitor General, for Appellant; and by Cullen & Dykman, by Jules Haberman, Esq. of Counsel for the Respondent; [fol. 95] and after due deliberation the Court of Appeals having rendered a decision and opinion herein and having ordered that the said order so appealed from be reversed and the determination of the Unemployment Insurance Appeal Board be affirmed with costs in this Court and in the Appellate Division and having further ordered that the

matter be remitted to the Appellate Division of the Supreme Court, Third Department, there to be proceeded upon according to law; and the Remittitur from the said Court of Appeals having been filed herein.

Now, upon motion of John J. Bennett, Jr., Attorneys General, Attorney for the Industrial Commissioner, it is hereby

Ordered that the order of the said Court of Appeals be and the same hereby is made the order of this Court, and it is further

Ordered that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the determination of the Unemployment Insurance Appeal Board be affirmed with costs in this Court and in the Appellate Division.

(s) John S. Herrick, Clerk, by Clyde Barber, Deputy Clerk.

[fol. 96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—January 6, 1943

The petition of International Elevating Company, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the order of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and prayer for reversal, and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final order of the Court of Appeals of the State of New York made and entered in said Court the 15th day of October, 1942 as prayed for in said petition, and that the Clerk of the Ap-[fol. 97] pellate Division of the Supreme Court of the State of New York, Third Department, shall, within forty days from this date, make and transmit to the Supreme Court of the United States under its hand and the seal of said Court a true copy of the material parts of the record herein

which shall be designated by praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient bond in the sum of $250.00 that said appellant shall prosecute said appeal to effect and answer all costs if he fail to make his appeal good, and that said bond, when filed and approved, shall stay the sending down of the mandate herein and all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated: January 6, 1943.

Irving Lehman, Chief Judge of the Court of Appeals, State of New York.

[fol. 98] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—December 30, 1942

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, International Elevating Company, respectfully shows:

1. Petitioner, a corporation organized and existing under the laws of the State of New Jersey, is the appellant in the above entitled cause.

2. Petitioner employed Joseph Bergen, claimant herein, during the years 1938 and 1939 as a grain trimmer attached to the "Themis", a documented vessel under the laws of the United States, one of its floating, self-propelled elevators operating on the navigable waters of New York Harbor and tributary streams.

[fol. 99] 3. This cause began with the filing by claimant in the New York State Department of Labor, Division of Placement and Unemployment Insurance, of a request for a hearing to determine whether or not claimant's employment by petitioner was covered by the New York unemployment insurance law.

4. This cause was initially heard and determined by a Referee of the Industrial Commissioner, the appellee, whose decision, dated July 9, 1940, held that the unemployment insurance law of the State of New York nonetheless applied to his employment contrary to the contentions of petitioner that the nature of claimant's employment, which was exclusively maritime in character, precluded its application. The Referee stated in his opinion (Record on Appeal, fol 51):

"The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be is conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matters."

5. On appeal from the decision of the Referee aforesaid, the Unemployment Insurance Appeal Board affirmed his decision and rendered an opinion which again recognized the existence of an issue under the Constitution of the United States thus (Record on Appeal, fols. 22-24):

"There is no provision in the New York State Unemployment Insurance Law specifically exempting from its [fol. 100] provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from the provisions of the Unemployment Insurance Law."

6. On appeal from the Board's decision aforesaid, the Appellate Division of the Supreme Court reversed, rendering an opinion in which the court stated (Record on Appeal, fols. 242-243):

"This jurisdiction is pursuant to section 2 of article III of the Constitution of the United States. It cannot be delegated to the several States. The grant of admiralty juris-

diction to the federal government was: '* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *.' (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149). This purpose would be violated if the Board's decision herein were upheld."

7. On appeal to the Court of Appeals, it was decided that the unemployment insurance law is applicable by its terms to maritime workers such as claimant herein and that the Constitution of the United States presents no obstacle to such an application; accordingly on remittitur from the Court of Appeals, the order of reversal of the Court of Appeals made and entered therein on the 15th day of October, 1942, was made the order of the Supreme Court, Appel-[fol. 101] late Division, Third Department, by order filed in that Court the 22nd day of October 1942.

8. The Court of Appeals is the highest court of the State of New York in which a decision herein can be had.

9. In this cause there is drawn in question the validity of a statute of New York State on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Section 2 of Article III of the Constitution of the United States.

Therefore, in accordance with § 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit: under § 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there are likewise filed herewith statements as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of [fol. 102] the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final order of the said Court of Appeals reversing the order of the Appellate Division of the Supreme Court, Third Department, of the State of New York herein, may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Appellate Division of the Supreme Court, Third Department under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved and that the said appeal may operate as a supersedeas.

Dated: December 30, 1942.

Arthur E. Goddard, Counsel for Petitioner.

[fol. 103] Supreme Court of the United States

[Title omitted]

Assignment of Errors—December 30, 1942

The petitioner assigns the following errors in the record and proceedings in this cause:

1. The State Court erred in holding that the unemployment insurance law, New York Labor Law, Article 18 (Consolidated Laws, Chapter 31), when applied to workers, such as claimant, engaged solely in maritime employment, is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.

2. The State Court erred in holding that said law, when applied to workers, such as claimant, engaged solely in maritime employment, constituting services as an officer or member of the crew of a vessel upon the navigable waters of the United States under applicable rulings of federal [fol. 104] administrative authorities, and therefore outside the scope of the Federal Unemployment Tax Act, Section

1607 (c)(4), is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.

3. The State Court erred in refusing to review the determination of the Referee and the Unemployment Insurance Appeal Board that this claimant was not an officer or member of the crew of a vessel upon the navigable waters of the United States, notwithstanding a determination to the contrary by the federal administrative authorities.

4. The State Court erred in holding that Section 534 of said law, providing that determinations of fact by the said Appeal Board shall be final, when applied to a determination of such a *jurisdictional* fact as whether or not claimant was performing service as an officer or member of the crew of a vessel on the navigable waters of the United States, is valid and does not violate Article III, Section 2 of the Constitution of the United States.

5. The State Court erred in failing to hold, as a matter of law, that claimant was a member of the crew of a vessel on the navigable waters of the United States.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said order of the Court of Appeals and the said order of the Appellate Division of the Supreme Court, Third Department, entered thereupon [fol. 105] in the above entitled cause on the 22nd day of October, 1942, be reversed and an order directed to be entered in favor of the appellant.

Dated: December 30, 1942.

Arthur E. Goddard, Counsel for Appellant.

[fol. 106] Cost Bond on Appeal for $250.00 approved; omitted in printing.

[fols. 107-110] Citation in usual form showing service on Nathaniel L. Goldstein omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—February 1, 1943

To the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department:

You are hereby requested to make a transcript of the record herein to be transmitted to the Supreme Court of the United States pursuant to the order of the Chief Judge of the Court of Appeals of the State of New York, dated January 6, 1943, in the above mentioned cause and to include in such transcript:

1. The papers and records as shown in the return and transcript on file in the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, making the order and judgment of the Court of Appeals the order and judgment of said Appellate Division;

2. The papers filed in the Office of the Clerk of said Court pursuant to the Rules of the Supreme Court of the United States.

Dated: February 1, 1943.

Arthur E. Goddard, Counsel for Appellant.

[fols. 112-113] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 114] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed February 15, 1943

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated: Brooklyn, New York, February 10, 1943.

Arthur E. Goddard, Counsel for Appellant.

No. 723

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—March 8, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The Solicitor General is requested to file a brief as amicus curiae and to participate in the oral argument if he so desires.

March 8, 1943.

Endorsed on Cover: File No. 47,224. New York, Supreme Court, Term No. 723. International Elevating Company, Appellant, vs. Frieda S. Miller, as Industrial Commissioner of the State of New York, and Joseph Bergen. Filed February 11, 1943. Term No. 723, O. T. 1942.